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THE WEST VIRGINIA CONTESTED-ELECTION CASES.

The Power of the State Legislature to Prescribe the Time of Congressional Elections.

SPEECH

OF

HON. R. M. SPEER,

OF PENNSYLVANIA,

DELIVERED IN

THE HOUSE OF REPRESENTATIVES,

ON

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SPEECH

OF

HON. R. MILTON SPEER.

The House having under consideration the resolutions reported from the Committee on Elections on the West Virginia contested-election cases—

Mr. SPEER said:

Mr. SPEAKER: I shall not follow the bad example of the gentleman from Massachusetts [Mr. BUTLER] by injecting into this discussion a partisan appeal. I know that the House of Representatives is not in its organization a judicial body. But there is nothing in the relative strength of the political parties on this floor, and there is nothing in the cases now pending, that should excite party feeling, or that should lead the members of the House away from their plain, sworn duty, fairly to judge of the elections of these claimants to seats here.

In 1872 there were two elections for Congressmen held in West Virginia, one on the fourth Thursday of August, and the other on the fourth Thursday of October. They were both regularly held by the officers duly authorized to hold elections, as appears by the certificate of the governor of the State. There is no allegation of fraud, violence, or intimidation. Every legal voter in that State had the full right to deposit his ballot if he wished so to do; hence, whether the vote at the one election or at the other election was large or small, it resulted not from anything connected with the conducting of the election itself, but from the indisposition of the voters to vote, and to some extent from doubt as to the legal day.

If the October election was the legal election, then Messrs. Wilson and Martin beyond all question are entitled to their seats. If the August election was the legal election, then Mr. Davis is and Mr. Hagans may be entitled to his seat. If neither was the legal day of election, then neither set of claimants is entitled to seats.

Before I proceed further let me say a word upon the merits of these cases. It is true that in the first district the vote polled in August is much larger than the vote polled in October. This results from the fact that there was an exciting contest then over the adoption or rejection of the new constitution. It was warmly supported upon the one side and warmly opposed upon the other. The whole State was aroused upon that single issue. Subordinate to it was the election of governor and other State officers. The names of the candidates were upon one slip of paper, forming but a single ticket; and many persons, doubtless, voted the ticket without knowing that they were voting for Congressman at all. This accounts for the large vote cast in August in the first district.

But I desire this House, in justice to Mr. Wilson, to know and remember that, believing the legal day of holding the congressional

election was the fourth Thursday of October, he did not intend to be voted for in August; but his friends urged him, as a matter of safety, to enter the August canvass, with the understanding that, even if elected then, he was also to run again in October, as Mr. Hereford did in the third district, and thus avoid any shadow of question as to getting his seat here. But it was now so late that he could not have tickets with his name on distributed throughout the entire district, which was territorially very large, and on this account and for this reason only he lost more votes than would have elected him. As it was, he was beaten but 413.

I hold in my hand the affidavit of Mr. Leonard, who was a member of the constitutional convention from Wirt County, which sustains my statement on this point, and I ask the Clerk to read it.

The Clerk read as follows:

WEST VIRGINIA, *Wood County, to wit:*

This day personally appeared before me, David D. Johnson, a notary public in and for the county and State aforesaid, D. H. Leonard, who, after being sworn in due form of law, says that he was a resident of Wirt County, West Virginia, at the time of and for several years before the election for State, county, and other officers on the fourth Thursday of August, 1872; that before said election, and when the democratic committee for said Wirt County were about to have the tickets printed for said election, they asked deponent (he having been a member of the State constitutional convention from that senatorial district) if it was necessary and proper to have the name of Colonel Benjamin Wilson, the democratic candidate for Congress, printed on said tickets to be voted for at said August election; deponent told them it was not necessary to do so as there would not be, in his opinion, an election for member of Congress until the fourth Thursday in October, and that is the opinion of the members of the convention. And for this reason Wilson's name was not printed on said tickets with other candidates, and was not voted for at said election in said county.

D. H. LEONARD.

Subscribed and sworn to before me this 20th day of November, 1873.
Witness my hand and notarial seal.
[SEAL.] DAVID D. JOHNSON, *Notary Public.*

Mr. SPEER. While the other democratic candidates received in this county about 550 votes, Mr. Wilson received only 163, showing a loss to him, by reason of the belief that August was not the legal time for the election, of nearly 400 votes, or about the number by which he was beaten in the district. The same state of facts existed at different polls in other counties. In those counties where the tickets with his name on were fully circulated he ran ahead of his party vote.

At the election in October a much smaller vote was polled than in August. There were no candidates voted for but members of Congress; and, coming so soon after the exciting struggle over the new constitution, it was not to be expected that a full vote would be cast. But Wilson was voted for in every one of the fifteen counties composing his district. In August there were over 36,000 less votes polled in the State for the candidates for Congress than were cast for and against the constitution, thus showing that that number of voters present at the polls and voting refused to participate in the election of Congressmen on that day, evidently from the belief that it was not the legal day.

I have thus referred to the facts in the first district, not because I believe they affect the question upon which this contest turns, but for the purpose of correcting an erroneous impression which has pervaded this entire discussion.

But what are the facts in the second district? There the leaders and representatives of both political parties met in convention before the August election; and after discussing the question as to when Representatives in Congress should be elected, both conventions con-

cluded that the fourth Thursday of October was the legal day; and therefore they adjourned without making any nomination for Congress. Of one of these conventions Mr. Hagans, now one of the claimants for a seat from that district, was a member. After the adjournment of his party convention, for the reason that August was not the lawful time for holding the election, Mr. Hagans, on his own account, and without a nomination from any party or convention, and without the knowledge of either party in several of the counties, had his name printed on the slip containing the names of the republican candidates, and was voted for in only four out of the eighteen counties composing the district. He received 3,441 votes in a district that, at the same election, gave the republican State ticket over 14,000 votes; and of the 3,441 he got 2,919 in two counties—his own and an adjoining one on the line of the railroad. In eleven counties there was not a single vote cast for any person for Congress at this election. The district embraced a large extent of territory, and in many parts of it the voters of both parties were blissfully ignorant that Mr. Hagans, even in imagination, was a candidate. His candidacy and pretended election were a fraud—a palpable fraud upon the people irrespective of party. Now, in view of these facts, unanswered and unanswerable, he claims a seat on this floor. In my judgment, he is no more entitled to admission here, either in law or justice, as a Representative of the people of the second congressional district of West Virginia, than is the king of the Ashantees. If successful, his success may be fitly described, in the language of the Berkeley Union, a republican journal of his own district, as the "larceny of the position," to which he was never legally chosen. So much for the merits of these cases.

In my argument upon the law, I shall reverse the order of time, and consider the October election first. And just at this point permit me to say that it appears to me much confusion and misapprehension have been introduced into this discussion all the way through by forgetting the fact that the Legislature of West Virginia, in providing for elections in that State, acted under authority derived from two separate and distinct sources. When it provided for the election of State officers, it was carrying out the authority which it derived from the State constitution. When it provided for the election of Congressmen, it was exercising authority derived, not from the State constitution, (because the State constitution could not confer it,) but derived from the national Constitution. Hence, if in a separate section the Legislature of West Virginia had provided for the election of State officers in execution of its authority under the State constitution, and then in another section had provided for the election of Congressmen under the authority derived from the national Constitution, and had in each section prescribed the same day, there would have been no question left then as to the proper construction of the statute. It has, however, done substantially that very thing, except that it has blended the execution of its dual authority into a single section, or, to speak more accurately, into two dependent sections.

I trust that this distinction will be borne in mind, because it has an important bearing on the argument in this respect: When the constitutional convention, as is alleged by the advocates of the August election, changed the time of holding the general election, it had jurisdiction over only the State election. The authority of the Legislature to prescribe the time for the congressional election had not been derived from any constitutional convention, and such a body had no jurisdiction over it. It had no authority to fix it as against

an existing provision of the Legislature on the subject, and no authority to change it. And if it had no authority to change it directly, it had no authority to change it indirectly or by implication. Hence, in construing the provisions of the constitution which it framed relative to elections, the fair and legal inference is, in the absence of express words to the contrary, that they refer only to such elections as the convention was competent to authorize, and not to those whose regulation as to time, place, and manner is placed by the Federal Constitution in the State Legislature.

What, then, was the legal day for holding the congressional election in West Virginia in 1872? To answer this question, is to determine this case. The majority of the committee believe, and have so reported, that the day prescribed by law was the fourth Thursday of October. Upon the other hand, two members of the committee hold that the legal day was the fourth Thursday of August; and two other members hold that there was no time legally prescribed for the election of Representatives in Congress in 1872.

I maintain that the Legislature of West Virginia prescribed the fourth Thursday of October as the day, and that no competent authority has changed or attempted to change the day.

The Federal Constitution, article 1, section 4, provides that—

> The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.

Observe the language. The *times "shall* be *prescribed"* "by the *Legislature."* Not "*may* be," leaving it to legislative discretion. The grant of the power is mandatory, not permissive; and devolves a *duty*—upon whom? The *Legislature*, composed, of course, of two houses. To do what? To *prescribe*, establish, make known beforehand, the *time* of electing Representatives in Congress. This *duty shall* be performed by the Legislature in advance of the election.

Having imposed this obligation, the Federal Constitution goes a step further, and requires in article 6 that—

> The Senators and Representatives before mentioned, *and the members of the several State Legislatures * * * shall be bound by oath or affirmation* to support this Constitution.

Having granted the power and imposed the duty, it enjoins the faithful execution of that power and the faithful discharge of that duty by the most solemn sanction known to the law. Mr. Webster, in the Massachusetts constitutional convention of 1820, declared that "whatsoever was enjoined on the Legislature by the Constitution of the United States the Legislature was bound to perform."

And, right here, let me say that the doctrine that a constitutional convention can exercise the power of prescribing the time for congressional elections, as against an existing provision of the Legislature, seems to me as dangerous as it is unwarranted. The members of a constitutional convention are not required to be sworn to support the Constitution of the United States; and if they have the power to do what it is not made their duty to do, they are a law unto themselves in its exercise. If the convention may prescribe the time, it may deny to the Legislature the power to prescribe it; and having taken from the Legislature the right to fix the time, may refuse to fix it itself; and, without the violation of any legal obligation, may, at its pleasure, leave the State absolutely unrepresented in Congress. Such a doctrine rests upon the theory that the Federal Government has sown in its very womb the seeds of its own destruction.

With its duty plainly before it, the Legislature of West Virginia, on the 13th of November, 1863, passed "An act to regulate elections by the people," which, in section 1, provides:

And on the fourth Thursday of October, 1864, and the same day in every second year thereafter, a governor, secretary of state, treasurer, auditor, and attorney-general for the State; *a Representative in the Congress of the United States for each congressional district, for the term commencing on the 4th day of March next after the election;* and a prosecuting attorney, surveyor of lands, recorder, county treasurer, and the number of assessors prescribed by law for every county.

Here was a specific day named, to wit, the fourth Thursday of October; and had this law remained unchanged in its letter this contest could not have arisen. But how came the letter of this section to be changed? In the same year that it was passed the Legislature passed "An act to provide for revising, collating, and digesting into a code, the statute laws now in force in this State." The title shows its object and purpose to be, not to enact new legislation, but to codify existing laws. The work provided for under this act was completed on the 29th December, 1868, and adopted as the code of West Virginia.

The preamble is as follows:

Whereas it is necessary and expedient that the general statutes of this State should be reduced into one act, and divided into proper chapters and sections, in order that omissions and defects should be supplied and remedied, and the whole rendered concise, plain, and intelligible—

The language of this preamble shows most clearly that it was not the intention of the Legislature to alter and repeal statutes, but to arrange, simplify, and systematize them. Turn to chapter 3 of the code relating to elections, and read its title: "The officers to be elected and the *time* of their election"—not the "occasion."

And this brings me to the existing law.

The first two sections of chapter 3 of the code of West Virginia are in these words:

1. The general election of State, district, county, and township officers, and members of the Legislature, shall be held on the fourth Thursday of October.

2. At the said elections in every year there shall be elected delegates to the Legislature, and one senator for every senatorial district. And in the year 1870, and every second year thereafter, a governor, secretary of state, treasurer, auditor, and attorney-general for the State; a prosecuting attorney, surveyor of lands, recorder, and the number of assessors prescribed by law, and a Representative in the Congress of the United States, for the term beginning on the 4th day of March next after the election, for every congressional district; and in the year 1870, and every fourth year thereafter, a judge of the supreme court of appeals for the State, and a clerk of the circuit court, and a sheriff for every county; and in the year 1874, and every sixth year thereafter, a judge for every circuit.

These sections are dependent and inseparable, and the one must aid in the interpretation of the other. The office and purpose of the first section is to prescribe the time of the election. The existing law fixed the fourth Thursday of October, and provided that on that day a Representative in Congress should be elected in every second year. The code separating the time of the election from the designation of the officers to be elected expresses in two sections what the election law of 1863 expressed in one. All that is in the section of the old law above cited is incorporated in the new, with the addition of certain officers whose election is also provided for. The act of 1863 prescribed a day certain, by name, for the election of Congressmen. The code, abbreviating the language, but not intending to change the law, provided in section 1 that the general election should be held on the fourth Thursday of October. There is no change in the day, and there is no change in the officers whose election was provided for on that day. But the first section ends after naming the time. That is its specific and only purpose.

Section 2 then follows with a designation of the officers to be elected. When? On the day prescribed in the first section. The second section is introduced with the words "at the said elections;" but this phrase is a mere form to connect the sections; the second section does not fix or change the time of the election; but it, *ex necessitate rei*, refers to the time already named in the first section. When it requires a Representative in Congress to be elected in every second year, it means that the day of his election shall be the fourth Thursday of October. The words, "at the said elections," used to introduce the second section and connect it with the first, do not mean at the general election *whenever* held, because that would not be "the said election" named, but another. The "said election" is the one held at the "said" *time* designated. If held at another time, and under another authority, it may be a general election, but it clearly is not "*the* said election" prescribed by the code, to which the second section refers.

Again, the words "at the said election," occur but once in the second section, and then their office plainly is to connect it with the first. They are not found in the sentence providing for the election of Representatives in Congress. The language is:

And in the year 1870, and every second year thereafter, a * * * Representative in the Congress of the United States, for the term beginning on the 4th day of March next after the election, for every congressional district.

Shall be elected. Observe, he is to be elected for the term beginning on the 4th of March next after the election; not after the general election, *whenever* it may be held, but after the election required to be held on the fourth Thursday of October. If the time of the election had not been regarded as definitely fixed, the commencement of the term of service would not have been designated by reference to the election, but by naming a specific date. For if the time of the election is ambulatory, unsettled, subject to occur in the first or the last month of the year, then the term of service may be rendered uncertain in its beginning, if not in its duration.

Time is an essential requisite in all legal elections. In this case the Legislature was bound to prescribe it. It named the fourth Thursday of October, and substantially provided that on that day Congressmen should be elected. If the code had left the law in one section as it found it, does anybody suppose that the language of the section would have been changed? Not at all. There was no thought of changing the day of holding the congressional election. But the codifiers, in arranging the various sections of the election law, had to transpose the words occasionally, in order to secure grammatical accuracy. They were not drawing a new act, but simplifying, as they thought, the old.

Is not, then, the fair reading of the first and the second section of the code this? "The general election shall be held on the fourth Thursday of October; and on said day, in every other year Representatives in Congress shall be elected?"

It cannot affect the provision for the congressional election that the election of various State officers is provided for in the same section; for all that relates to these may be omitted, and the section stands complete.

The sense of the second section may be more fully seen by inserting after the words "at the said elections," the words "namely, on the fourth Thursday of October;" and the two sections would then read:

SECTION 1. The general election shall be held on the fourth Thursday of October.

SEC. 2. At the said elections, namely, on the fourth Thursday of October in every second year, Representatives in Congress shall be elected.

Numerous instances of this exact phraseology may be found in the legislation of the various States.

In view of the duty of the Legislature to prescribe the time, and in the light of the history of the legislation of West Virginia upon the subject, the legal construction of the code is, in my judgment, that the day, and not the "occasion" of the congressional election, is prescribed.

But it is claimed, on the other hand, first, that the Legislature prescribed the time for the general election, and provided that at the general election, whenever held, members of Congress should be elected; and, secondly, that the new constitution changed the day for holding the general election in 1872 to the fourth Thursday of August, and hence carried to that day, *ex vi termini*, the election of Congressmen.

The first position assumes that the Legislature discharges its duty, under the Federal Constitution, of prescribing the time, by prescribing an "occasion" or event. That the Legislature may legally make the date of the election of Congressmen depend upon the happening of an event, may be admitted, so long as the Legislature controls the event itself. But when the claim is that the Legislature has fixed the time by making it dependent upon an event which it cannot control, then the statute should not be so construed unless its terms absolutely require it. Where two interpretations are sought to be given to the same words, that one is to be preferred which attributes to the enacting power a faithful performance of its duty, and a strict observance of the limitations under which it acts. The Federal Constitution requires that the time shall be prescribed by the Legislature, not that the Legislature shall authorize or permit some other body to do it. The thing to be done is a legislative act, and cannot be delegated—at least not beyond the controlling power of the Legislature.

In Cooley's Constitutional Limitations, page 116, it is said, on the subject of delegating legislative power:

> One of the settled maxims in constitutional law is, that the power conferred upon the Legislature to make laws cannot be delegated by that department to any other body or authority. When the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.

And the same doctrine is well expressed by Chief Justice Gibson, in 5 Watts and Sergeant's (Pennsylvania) Reports, page 283, thus:

> Under a well-balanced constitution the legislature can no more delegate its proper function than can the judiciary. It is on the preservation of the lines which separate the cardinal branches of the government that the liberties of the citizens depend; for a consolidated sovereignty, in whatever form, is a despotism, in so far as it subjects the governed, not to prescribed rules of action, to which he may safely square his conduct beforehand, but to the unsettled will of the ruling power, which cannot be foreseen; and a government becomes consolidated in proportion as its legislative branch abandons its own function, or usurps those which have been vested elsewhere.

See also Brightly's Leading Cases on Elections, pages 3 to 26.

It is conceded that it is not a legitimate argument to say that because the Legislature cannot legally prescribe an "occasion" for the holding of congressional elections, therefore it has not done so. But where the inquiry is, What has the Legislature done? it is proper, in interpreting its words, to remember that of the two interpretations insisted upon, one lies within the limit of its power, and the other

beyond it. In the absence of controlling words the presumption is in favor of the former and against the latter.

Whence comes this word "occasion?" It is not found in either the Federal or the State constitution, nor in the code; it exists only in the theories of these who sustain the validity of the August election. It is legally true that that is certain which can be rendered certain; but rendered certain by whom? Can it be said, in any just sense, that the Legislature has prescribed the time by prescribing an event the happening of which is subject to a power independent of the Legislature?

In such a case the event is not certain, nor can it be rendered certain by the body whose duty it is to prescribe the time. For if the Legislature discharges its duty by naming the event, and the time for the happening of the event can be legally fixed or altered by a constitutional convention, then it logically follows that the convention can refuse to prescribe the time of the event, and hence no congressional election at all could be held. The Legislature may legally prescribe the event, which event may legally never occur! Besides, this theory invests the convention with the power to do indirectly what it cannot do directly. If it cannot prescribe the time, how can it prescribe the time of the event or occasion on which the election is to be held? The practical result is the same in either case; and if there is no power to do the one, there is none to do the other.

Suppose the constitutional convention had extended the terms of the State officers, and provided that no general election should be held in West Virginia until 1874. Then, upon the theory that the election of Representatives in Congress depended upon the occurrence of the general election, the State would be absolutely without repr esenta tion in the present House; and this, too, in the teeth of the code, which provides that Representatives shall be elected in every second year.

If the Legislature can discharge its duty by prescribing an event, and leaving the time of the event to be determined by a constitutional convention, why may not the happening of the event be as well determined by a board of school directors, or by John Doe and Richard Roe?

No construction which leads to such results should be given to the act of the Legislature, if a more reasonable one can be supported by any fair use of the words employed. It was the duty of the Legislature to prescribe the time of the congressional election. In performing this duty, it prescribed a day for the general election; and then provided that Congressmen shall be elected at "the said election." If it still be insisted that their election was dependent upon an event or occasion, the answer is twofold: first, that the Legislature, in naming the event, prescribed the day on which it should occur; and, secondly, that as to the election of Representatives in Congress, no power in the State or out of it was competent to separate the event from the time except the Legislature itself. In prescribing the time for the State election, the Legislature was acting under the State constitution; but in prescribing the time for the congressional election, it acted under the power granted by the Federal Constitution. It blended in one act its exercise of these distinct powers; but this fact did not change the character of the act or blend into one the separate sources which gave it life. The presumption is that the Legislature, in adopting the language of the code, was mindful of the dual authority under which it was acting, and intended to discharge in good faith the sworn duty resting upon each one of its members.

If the code, as I have endeavored to show, prescribed a day and not an "occasion" for the congressional election, then the argument is at an end; but if it did not, then it is urged by the advocates of the August election, secondly, that the convention changed the general election in 1872 from the fourth Thursday of October to the fourth Thursday of August, and therefore carried the congressional election to that day.

Mr. CRITTENDEN. Will the gentleman yield to me for a question?

Mr. SPEER. With pleasure.

Mr. CRITTENDEN. When was this constitution of West Virginia voted on? Was it not on the 22d of August?

Mr. SPEER. Yes, sir.

Mr. CRITTENDEN. Suppose that constitution had been defeated, what would have been the result of these congressional elections held in August?

Mr. SPEER. I thank the gentleman for his suggestion. It is in the line of my argument, and I will answer it at a later stage.

I submit—

First. That the election held on the fourth Thursday of August was not a general election.

Secondly. That the time of holding it was not *prescribed*, as required by the Federal Constitution, for the election of members of Congress.

Thirdly. That the convention, in authorizing it, did not change or attempt to change the time of electing Congressmen; and even if it did change it, its act was void.

Let us see what the powers of this convention were.

In the first place, article 12, section 1, of the old constitution of West Virginia, under which the constitutional convention was called, provided that it should only be amended by a convention called as therein specified, and that—

> All acts and ordinances of said convention shall be submitted to the voters of the State for ratification or rejection, and shall have no validity whatever until they are ratified; and in no event shall they, by any shift or device, be made to have any retrospective operation or effect.

In the second place, it was called under the authority of "An act to take the sense of the people upon the call of a convention, and for organizing the same," passed 23d of February, 1871, from which I quote two sections:

> SEC. 17. The persons who shall be elected in pursuance of this act shall, on the third Tuesday in January next, meet and assemble at the seat of government, in general convention, to consider, discuss, and propose a new constitution, or alterations and amendments to the existing constitution of this State.
>
> SEC. 20. The said convention shall provide by ordinance or otherwise for submitting the said constitution to the people for ratification or rejection.

It will thus be seen that the convention was called for a specific object, and after having accomplished that object, it was authorized to submit its work to the people for ratification or rejection. Under the constitution and law, which gave it all the life it had, it was expressly provided that all its acts and ordinances shall have no validity whatever until ratified; and by no shift or device shall they be made to have any retrospective operation or effect. This was the law of its being, and when it transgressed it, its act was void.

Vague notions of the powers of constitutional conventions have largely prevailed since the war; originating mainly in the dangerous and ragged precedents furnished by the reconstruction of the Southern States. These conventions are not above the law; they cannot enact law; but they are under the law, and their work must remain

subject to the law, until the people by their votes stamp it with the royal seal of sovereign power.

In the most able and exhaustive work of Professor Jameson upon constitutional conventions, after an elaborate discussion of the question, he says, on page 326:

On the contrary, as we have seen, both reason and authority concur in assigning to the convention a particular function, limited by the act under which it convenes, which is its charter or constitution.

I desire the Clerk to read an extract from a recent decision of the supreme court of Pennsylvania. In that instance a constitutional convention had been authorized to submit a new constitution, and to submit it in such manner as it might think proper. It appointed a special election board for the city of Philadelphia. Ignoring the general election officers, it named a commission of five to hold the election. Bills were filed for an injunction against the commissioners, and they were enjoined, the supreme court in a unanimous opinion using this language:

The convention is not a co-ordinate branch of the government. It exercises no governmental power, but is a power raised by law in aid of the popular desire to discuss and propose amendments, which have no governing force so long as they remain propositions. While it acts within the scope of its delegated powers it is not amenable for its acts; but when it assumes to legislate, to repeal, and displace existing institutions before they are displaced by the adoption of its propositions, it acts without authority, and the citizens injured thereby are entitled, under the declaration of rights, to an open court, and to redress at our hands.

I will ask the Clerk to read also a resolution offered in the Massachusetts constitutional convention of 1820, with the remarks thereon by Mr. Justice Story.

The Clerk read as follows:

Resolved, That the constitution ought to be so amended as to provide that the representatives of this Commonwealth in the Congress of the United States, and so many of the electors of President and Vice-President as are equal to the number of the Representatives aforesaid, shall be chosen by the people in each convenient district as the Legislature shall direct; and that the Legislature of this Commonwealth shall be required at their session next after every apportionment of Representatives by the Congress of the United States to provide by law, by dividing the Commonwealth into districts, for the choice of not more than two Representatives or electors in any one district, and such law shall not be repealed or altered until after a new apportionment of Representatives by the Congress of the United States.

Mr. Story, in the discussion, said:

The question then was whether we have a right to insert in our constitution a provision which controls or destroys a discretion, which may be, nay, which must be, exercised by the Legislature, in virtue of powers confided to it by the Constitution of the United States. The fourth section of the first article of the Constitution of the United States declares "that the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators." Here an express provision was made for the manner of choosing Representatives by the State Legislatures. They have an unlimited discretion in the subject. They may provide for an election in single districts, in districts sending more than one, or by general ticket for the whole State. Here is a general discretion, a power of choice. What is the proposition on the table? It is to limit this discretion, to leave no choice to the Legislature, to compel Representatives to be chosen in districts. In other words, to compel them to be chosen in a specific manner, excluding all others. Was not this plainly a violation of the Constitution? Does it not affect to control the Legislature in the exercise of its legitimate powers? Does it not interfere with the superintending authority of Congress? * * * * *

The members of the Legislature are under oath to support the constitution of the State. They are also under oath to support the Constitution of the United States. Will it not be a violation of their oaths to bind themselves not to choose Representatives in any manner that the Constitution of the United States allows, except that stated in the gentleman's proposition, when they are satisfied that the public interest requires another manner of choice? They may bring their consciences into

jeopardy by such proceedings. It would be a direct and manifest departure from their duty. * * * * * *

It assumes a control over the Legislature which the Constitution of the United States does not justify. It is bound to exercise its authority according to its own views of public policy and principle; and yet this proposition compels it to surrender all discretion. In my humble judgment, and I speak with great deference for the convention, it is a direct and palpable infringement of the constitutional provisions to which I have referred.

Here the proposition was simply to limit the discretion of the Legislature as to the *manner* of electing Representatives in Congress; and Justice Story believed even this to be unconstitutional, and the resolution failed.

But the convention of West Virginia having been called under the authority stated, with the sphere of its powers clearly defined, what did it do?

It submitted a new constitution to the people on the fourth Thursday of August, 1872, for their ratification or rejection, providing that, in the event of its ratification, it should be operative and in full force from and including the whole of that day. It was ratified. The election was held under the authority of section 3 of the schedule, which provides:

3. The officers authorized by existing laws to conduct general elections shall cause elections to be held at the several places of voting, established by law in each county, on the fourth Thursday of August, 1872, at which election the votes of all persons qualified to vote under the existing constitution, and offering to vote, shall be taken upon the question of ratifying or rejecting this constitution and schedule.

There was no law of the State authorizing any election on this day; and the schedule, in providing for this election, directs the officers, authorized by existing law to conduct general elections to hold it.

If the schedule had stopped here, no one could pretend that the election ordered was a general one. Up to this point it has but a single object, and that not to elect a single officer. And as the gentleman from Wisconsin [Mr. ELDREDGE] at my side suggests, if the convention itself had intended it to be a general election, it would have used the words, "The officers authorized to hold *other* general elections shall hold this one." The provision that the officers of the general election shall conduct this one clearly recognizes the distinction between the two elections.

But the schedule further provides:

SEC. 7. On the same day, and under the superintendence of the officers who shall conduct the election for determining the ratification or rejection of the constitution and schedule, elections shall be held at the several places of voting in each county, for senators and members of the house of delegates, and all officers, executive, judicial, county, or district, required by this constitution to be elected by the people.

Observe the special character of the election as recognized in this section. It is designated "the election for determining the ratification or rejection of the constitution and schedule." Such it literally was, and such only could it lawfully be. The power that called it into being had specially defined its duty and limited its action.

The gentleman from Massachusetts [Mr. BUTLER] says that if the election of members of Congress at this election was illegal, then there is no lawful State government to-day in West Virginia. Not so, however; the gentleman in his zeal has lost his usual clearness. The Constitution of the United States requires the time for the election of Representatives in Congress to be prescribed by the Legislature; but the constitution of West Virginia does not require the time for the State election to be prescribed by any authority. This is the distinction, and this the answer.

The provision for the election of State officers does not change the special *purpose* for which the election is held, and therefore cannot change its special *character*. The election of the officers named, at the time named, is contingent and dependent—hinged entirely upon the result of the election at which they may be voted for. If the constitution fails, there are no offices to be filled.

Let it be here distinctly remembered that the validity of the congressional election in August, in the tenderest view that can be taken of it, must rest absolutely upon the proposition that this election, authorized solely by the schedule, is the general election designated and prescribed in the first section of the code. If this proposition fails, the August election fails.

First. The schedule is advisory and provisional, to be worn for a little while as a garment and then cast off. Its office was to cover the transition period from the old to the new constitution.

Granting to the schedule all the power that it expressed or claimed to exercise, we find that by its direct terms the election authorized by it in section 7 is limited to the officers named "and those required by this constitution to be elected by the people." Representatives in Congress are not named, and there is not a word in the constitution requiring them to be elected. How, then, in all candor, can they be included as among the officers whose election is provided for by the schedule? They are not only not included, but they are by the terms of the section absolutely excluded.

Secondly. The constitution by the express terms of section 6 of the schedule was in force every moment of time from twelve o'clock on the night of the 21st of August, that is, seven hours before a single vote was cast for it or against it. During the whole of the 22d of August it was the supreme organic law of West Virginia, and it provided in section 7 of article 4 that—

> The general election of State and county officers, and of members of the Legislature, shall be held on the second Tuesday of October, until otherwise provided by law.

Hence it follows, as surely as day follows night, that during every hour of the 22d of August it was ordained by the constitution of West Virginia that the "general elections of that State shall be held on the second Tuesday of October, until otherwise provided by law." And this being so, how could the "general election," thus fixed on the 2d Tuesday of October, be legally held under any authority, much less under the authority of the schedule, on the 22d day of August? Not only was the "general election" not authorized on that day, either by law or schedule, but the highest law of the State, the constitution, required it to be held on another day.

Thirdly. The code provides that "at the said election" "there *shall* be elected" Representatives in Congress. But at the election authorized by the schedule it was impossible for anybody to be elected unless the constitution was ratified. A candidate at this election might have received every vote cast, and yet have been practically defeated by a smaller vote polled, not against him but against the constitution. It put it in the power of the voter to say to a candidate, "I will vote for you, but at the same time I will cast another vote which will render your election impossible." And the singular spectacle was presented in West Virginia of candidates soliciting votes for themselves while earnestly opposing the constitution upon whose adoption alone they could succeed. An election is the means authorized by law of ascertaining the choice of voters; but here the choice of the voters for officers was to be regarded only upon the condition that at the same time they chose to ratify the constitution.

Fourthly. The code required the election of Representatives in Congress *by districts*, and no voter of one district could vote for the candidate of another district. But at this August election a candidate for Congress was dependent for success, not upon the number of votes cast for or against him in his district, but upon the number cast for or against a separate and independent proposition in another district. It thus enabled a voter who could not legally vote *for* a candidate legally to vote *against* him. For instance, Mr. Davis, who claims a seat under the August election, might have received every vote in his district, and the new constitution might have had a majority there, and yet the voters of the other two districts in the State could have defeated him, not by voting against him, but by voting against the constitution. Who ever heard before, in all the wide world, of such a congressional election? It was not only without law, but in utter defiance of the law. The proposition when laid naked is simply this, that the schedule took the place of the code, and provided for the election of members of Congress by districts on the fourth Thursday of August, and yet at the same time put it in the power of any *one* of the three districts in the State to defeat an election in *all* of them. A majority of one against the constitution would override a majority of ten thousand for a candidate. The minority outvote the majority! Whatever necessity there may have been for providing for an election of State officers simultaneously with the submission of the constitution, there was clearly none in the case of members of Congress. The office was not created by the constitution, and would have to be filled whether it was ratified or rejected.

Fifthly. The August election was special in the authority that provided it; special in its purpose; special in its time, and especially special and exceptional in the fact that the success of any person voted for at it was dependent, not upon the number of votes he received, but upon the number cast for the very instrument which authorized the election. Special in authorization, purpose, time, and results, how can it be seriously said that this was "the general election" prescribed by the code, at which one Representative in every district *shall* be elected? That cannot be the election authorized by law for members of Congress which, by its terms, virtually says they shall not be elected unless the one hundred or more propositions in a proposed State constitution are also elected. It is a conditional election; Congressmen may be elected provided something else be done at the same time.

Mr. LAMAR. The election of members of Congress should never depend upon a contingency.

Mr. SPEER. It is no answer to all this to say that the voters of the whole State had a right to vote, and that all the State officers were voted for, and hence the election was general. These, undoubtedly, are two characteristics of a general election. They are good as far as they go, but they do not go far enough. All the voters had the right to vote for or against the constitution; but this fact would not make an election, held for submitting it to the people a general election. On the other hand, an election may be general at which no State officers are voted for. At the general elections in many, if not all, the States, there are years when no State officers are elected. The general election *must be authorized by law*, and must not be dependent upon the will of the voters as to whether it shall be an election at all or not. Instead of the August election being the general election, one of the sections of the constitution which it ratified declared that the general election "*shall* be held on the second Tuesday of October." It was not the general election, but it determined *when* the general election should annually occur.

Suppose the President were to convene the two Houses of Congress in extra session. When convened, the extent of their jurisdiction would be precisely the same as if they were in regular session. There would be no difference in the scope of their powers. But would the fact of equal and general legislative jurisdiction take from the called session its special character? So the fact that the voters at the general election had the right to vote at the August election does not determine or change the essential character of that election.

Hence it seems to me as clear as a mathematical demonstration that the August election was special and not general. The election was never to be held again under the same authority; it was never to be held again for the same purpose; it was never to be held again on the same day; and it was never again to make the success of candidates depend, not upon the number of votes cast for or against them in their own county or district, but upon the number of votes cast for or against the constitution in other counties or districts. This election no more resembles "the said election" prescribed and established by the code, at which members of Congress "shall" be elected, than the corpse resembles the living, breathing, moving man.

Here the argument in behalf of the August claimants helplessly fails; but there are still other insuperable objections. Whether that election was special or general, the time of holding it was not *prescribed* as required by the Constitution of the United States for the election of Representatives in Congress.

Not insisting on any technical meaning for the word "prescribe," all admit that it means to determine, to establish. Now, was the August election established by any authority, competent or incompetent, in advance? Who could tell up to the last hour of that Thursday, whether there would be any election at all for members of Congress? The schedule under which the election was held submitted the question to the people, whether or not they would ratify the constitution. When it was known they did ratify it, *then*, and not until then, was it determined, or could it be determined, that that was the time for the election of anybody.

The civilized world execrates Caligula for writing his laws in characters so small, and hanging them on walls so high, that the people could not read them. But here we have a proposition dependent upon ever having the force of law, on the undiscovered will of the voters, unwritten, and unhung upon any wall, converted by a legal fiction into a binding, prescribed law, not only before that will was known, but before a single vote had been cast. If the constitution had failed there would have been no election, and hence no time for any; whether the constitution would or would not fail, could not, in the nature of the case, be known until the polls were closed, and was not in fact known for many days afterward. Now, can it be said, or with patience be heard, that when the *time* of the election is dependent upon the *result* of the election itself, that the time is, in any legal or just sense, *prescribed?* In such a case no human being can know the time until he knows the result. And no sophist has ever yet proved that the result of an election, however certain, was prescribed by law. To state the proposition is to exhibit its rank absurdity.

The requirement of the Federal Constitution is identical as to time, place, and manner. Suppose the convention of West Virginia had provided, in submitting the constitution to the people, that the *places* of voting for candidates for Congress should be at those polls where a majority of the votes cast shall be for the constitution; or that the manner of voting, whether *viva voce*, or by ballot, shall be

determined by the result of the vote on the new constitution. Under such circumstaces, could it be said that the *places* and the *manner* of electing Representatives in Congress, were established or known beforehand? Would it be possible for any voter to know either the place or the manner, until he would know the resnlt? The election would make certain *for the future* the place and the manner, but that is not prescribing them. The Constitution of the United States, in requiring the times, places and manner of holding congressional elections to be prescribed, i tended to have all doubt and uncertainty removed, and to secure freedom and fullness of choice to the voters. The August election had not been prescribed, but was authorized *to prescribe itself*. So far as relates to Representatives in Congress, it was a bastard—without parentage; and it should die, childless.

But it has been singularly claimed that the election both in August and in October was illegal; which is simply saying, that the convention had the power to pull down, but not to build up; to destroy, but not to create. If it could not, and did not, change the congressional election from the fourth Thursday of October to the Fourth Thursday of August, it did not attempt to change it to any other day for that year. I listened with great pleasure to the able argument of my friend from Maryland [Mr. WILSON] upon this point, but it did not satisfy me. The code expressly provides for the election of Congressmen in 1870, and in every second year. The Legislature has not changed this provision, and if by any means, direct or indirect, the convention rendered an election in 1872 impossible or illegal, it repealed, nullified the code, and its act was void. But it did not attempt to do any such thing. There is not a word in either the schedule or the constitution upon the subject; but the thirty-sixth section of article 8 of the constitution provides that—

> Such parts of the common law, and of the laws of this State, as are in force when this constitution goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the Legislature.

It was the law of "this State" that Representatives in Congress "shall be elected in 1870, and in every second year thereafter," at "the said elections," prescribed in the code. This law was not "repugnant" to the constitution, for in terms it does not refer to members of Congress, and does not say a word about their election. It is not to be inferred that it abolished the prescribed day of their election without naming another; and as no other is named, the day fixed by the code stands. The constitution changed the day of the general election of State officers; but it had no power (and if it had it did not exercise it) to change the time of the congressional election. And if it could not do this directly, no inference can arise that it did it indirectly.

In the case of Chase *vs.* Miller, in Pennsylvania, Justice Woodward said:

> Constitutions, above all other documents, are to be read as they are written; judicial glosses and refinements are misplaced when laid upon them. Carefully considered judicial implications may, indeed, be made upon them in support of statutes (never to defeat statutes) when such implications are grounded in the constitution itself, and tend to accomplish its obvious purposes, as well as to promote the public welfare.

The repeal of statutes by implication is not favored. Mr. Justice Story, in Wood *vs.* The United States, (16 Peters, 363,) uses this language in delivering the opinion of the court:

> The question then arises whether the sixty-sixth of the act of 1799, chapter 128, has been repealed, or whether it remains in full force. That it has not been expressly or by direct terms repealed is admitted; and the question resolves itself into the more

narrow inquiry, whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it; for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnance between the provisions of the new laws and those of the old; and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy. (See also Dwarris on Statutes and Constitutions, pages 150, 154, and 10 Barr., 448.)

In 9 Barb., 308, it is held that—

Where a late statute is absolutely repugnant to a former one only in part, it repeals the former only so far as the repugnancy extends, and leaves all the remainder in force.

In 1 Black U. S. R., 470, it is said:

A repeal by implication is not favored; the leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the Legislature together.

Hence a repeal by implication is not favored; on the contrary, courts are bound to uphold the prior law if the two acts may well subsist together. (By Nelson, Bowen on Leases; 5 Hill, 225, 226; Dr. Foster's case, 11 Coke, 63.)

The repeal of a law by implicatitn and construction of a subsequent statute should be so clear as to leave no reasonable doubt that such was the intention of the Legislature. It should not be deduced by an ingenious course of argument, but should appear at once. (Crabbe's Rep., 356.)

It seems to be well settled that a general statute without negative words cannot repeal a previous statute which is particular, even though the provisions of one be different from the other. (9 Harris, 43, citing 6 Report, 19.)

The repugnancy between the provisions of two statutes must be clear, and so contrary to each other that they cannot be reconciled, in order to make the latter operate a repeal of the former. This rule is the result of a long course of decisions, and we know of no reason why it does not equally apply, where the repugnancy is alleged to exist, between a constitutional provision and a logislative enactment. (Ohio *ex. rel.* Evans *vs.* Dudley, 1 Ohio State Reports, new series, 441; 2 Ohio State Reports, new series, 607.)

The principle prevails even where the statutes are penal, and where the humanity of the law would plead for another construction. (9 Harris, 43.)

Where both are merely affirmative, and the substance such that both may stand together, both shall have a concurrent efficacy. (1 Blackstone's Commentaries, 89.)

In the light of this unbroken line of judicial decision there is no room for inference. It is one of the highest rights of a State to be represented in Congress, the Legislature of the nation. West Virginia had done, by her legislative body, all that was required to secure her representation here, and it is the duty of this House to admit the persons elected under her law. Even if there was a *conflict* between the Legislature and the convention as to the time of the election, which there is not, a decent respect for consistency, if not for law, would require the House to follow its own precedents.

In the case of Baldwin *vs.* Trowbridge, in the Thirty-ninth Congress, this House held that "where there is a conflict of authority between the constitution and the Legislature of a State, in regard to fixing the place of elections, the power of the Legislature is paramount."

If paramount as to place, it must be paramount as to time.

But if there be doubt, it is our duty to adopt that construction of the constitution and law of West Virginia which has been given to them by the State authorities.

The Committee on Elections of the last Congress, in the Tennessee cases, held this language:

If, however, the question as to whether by the act of 1870 the time for holding the election in question was changed from August to November was one of doubt, we should feel bound to follow the construction given to it by all the authorities of the State of Tennessee, whose duty it has been to construe it and to execute it. It is admitted that the governor, and all other authorities in Tennessee having anything to do with the construction and enforcement of this act of 1870, have construed it as in nowise affecting the act of 1868, and by common and universal assent the election was held at the time fixed in the latter act. It is a well-established and most salutary rule that where the proper authorities of the State government have given a construction to their own constitution or statutes, that construction

will be followed by the Federal authorities. This rule is absolutely necessary to the harmonious working of our complex governments, State and national; and your committee are not disposed to be the first to depart from it.

And the House unanimously adopted the report.

The contemporaneous construction so universally given to these acts would be entitled to great weight if the question were doubtful. But other reasons make the case too clear to require the aid of this authority. (9 Harris's Pennsylvania State Reports, pages 43 and 44.)

In West Virginia the State officers specially authorized by law to declare the result of the congressional election in 1872 have declared October as the legal time; and, as a matter of fact, it was publicly stated in the constitutional convention, at the time the schedule was under discussion, that it did not embrace the election of Representatives in Congress, and was not intended to embrace it; and before the August election the president of the convention, the chairman of the committee on schedule, the chairman of the committee on elections, and the chairman of the committee on the judiciary, all published letters stating that, in their judgment and from their knowledge of the purpose and work of the convention, the legal day for the election of Congressmen was the fourth Thursday of October. In the face of the law and of this common understanding of it, the House is asked to seat the claimants under the August election. Political majorities may override or disregard the law, but they cannot make the wrong the right; and, however long delayed, the time will come when these acts of usurpation will return to torment their inventors. Partisan appeals may crown with their triumph the work of this day, but with calmer moments will come the sincere regret that, in the struggle now closing, the crack of the party lash was permitted to hush the individual judgment, and to bury in silence the call to fearless duty.

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